

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

AMERICAN CIVIL LIBERTIES UNION
OF WASHINGTON,

Plaintiff,

v.

U.S. DEPARTMENT OF JUSTICE,

Defendant.

No. C09-0642RSL

ORDER FOLLOWING *IN CAMERA*
REVIEW

Following a series of orders in which the Court attempted to evaluate the adequacy of the government's response to a request for information under the Freedom of Information Act ("FOIA"), 5 U.S.C. § 552, the Department of Justice produced a number of unredacted documents for *in camera* review. Having reviewed the documents and the memoranda submitted by the parties,¹ the Court finds as follows:

Document No. 2

Pursuant to Exemption 7(E), FOIA does not require the disclosure of information compiled for law enforcement purposes that would "disclose techniques and procedures for law enforcement investigations or prosecutions, or would disclose guidelines for law enforcement

¹ In its March 10, 2011, order, the Court indicated that it might require the assistance of Mr. Hardy or another knowledgeable person to complete the *in camera* review process. Having now reviewed the documents, the court finds that *ex parte* communication with a defense representative, to which plaintiff objected, is not necessary or warranted.

ORDER FOLLOWING *IN CAMERA* REVIEW

1 investigations or prosecutions if such disclosure could reasonably be expected to risk
 2 circumvention of the law.” 5 U.S.C. § 552(b)(7)(E). The Court finds that the information
 3 redacted from NCIC-VGTOF-8352 was compiled for law enforcement purposes, discloses
 4 investigative techniques and procedures, and could reasonably be expected to be of use to those
 5 attempting to circumvent the law.

6 With regards to the redactions asserted under Exemptions 6 and 7(C), defendant
 7 appropriately redacted personal (albeit in some cases coded) identifiers and contact information,
 8 the disclosure of which would constitute a clearly unwarranted invasion of personal privacy. No
 9 further disclosures regarding Document No. 39 are necessary.

10 **Document Nos. 3, 4, 16, and 17**

11 Exemption 5 protects from disclosure those documents which would be subject to
 12 a privilege in the civil discovery context, including the deliberative process privilege. Nat’l
 13 Labor Relations Bd. v. Sears, Roebuck & Co., 421 U.S. 132, 149 (1975); Lahr v. Nat’l Transp.
 14 Safety Bd., 569 F.3d 964, 979 (9th Cir. 2009).

15 The deliberative process privilege rests on the obvious realization that officials
 16 will not communicate candidly among themselves if each remark is a potential
 17 item of discovery and front page news, and its object is to enhance the quality of
 18 agency decisions by protecting open and frank discussion among those who make
 them within the Government.

19 Dep’t of Interior v. Klamath Water Users Protective Ass’n, 532 U.S. 1, 8-9 (2001) (internal
 20 citations and quotation marks omitted). To fall within this privilege, a document must be both
 21 pre-decisional (*i.e.*, prepared to assist an agency decisionmaker in arriving at a decision) and
 22 deliberative (*i.e.*, reflects a candid discussion within the agency regarding how to perform its
 23 functions). Lahr, 569 F.3d at 979.

24 Defendant has withheld four documents solely on the ground that they are drafts.
 25 Drafts are not presumptively exempt from production under Exemption 5. Defendant has failed
 26 to show that any portion of these documents, much less their entireties, were prepared to assist

1 an agency decisionmaker in arriving at a decision and reflect a candid discussion of anything
2 more weighty than word choice or grammatical considerations. Defendant shall, within fourteen
3 days of the date of this Order, remove redactions asserted under Exemption 5 to Document Nos.
4 3, 4, 16, and 17 and produce the documents to plaintiff.

5 **Document Nos. 5 and 15**

6 The redactions asserted under Exemption 7(D) in the supplemental Vaughn index
7 have been removed following discussions between the parties. Dkt. # 78 at 11, n.7. To the
8 extent information has been withheld from these documents pursuant to Exemption 3 as
9 Sensitive Security Information (“SSI”), no further production will be ordered, however. The
10 Court lacks jurisdiction to evaluate the validity of the Transportation Security Administration’s
11 designation of information as SSI.

12 **Document No. 6**

13 To the extent information has been withheld from Document No. 6 pursuant to
14 Exemption 3 as Sensitive Security Information (“SSI”), no further production will be ordered.
15 The Court lacks jurisdiction to evaluate the validity of the Transportation Security
16 Administration’s designation of information as SSI.

17 **Document No. 13**

18 Exemption 6 protects from disclosure “personnel and medical files and similar
19 files the disclosure of which would constitute a clearly unwarranted invasion of personal
20 privacy.” 5 U.S.C. § 552(b)(6). FOIA also protects from disclosure information compiled for
21 law enforcement purposes that “could reasonably be expected to constitute an unwarranted
22 invasion of personal privacy.” 5 U.S.C. § 552(b)(7)(C). In order for disclosure to constitute an
23 unwarranted invasion of personal privacy, the information at issue must be identifiable as
24 applying to a particular individual. Dep’t of State v. Wash. Post Co., 456 U.S. 595, 602 (1982).
25 Plaintiff does not seek disclosure of the names or contact information of government employees
26 or contractors. Dkt. # 39 at ¶ 22; Dkt. # 40 at 20; Dkt. # 78 at 18. Thus the redaction of

1 employee/contractor names and their contact information from Document No. 13 is appropriate.
2 There does not, however, appear to be any privacy-related justification for the redaction of
3 agency, center, or other organizational unit names or contact information under Exemptions 6 or
4 7(C).

5 Exemption 7(E) authorizes the redaction of information compiled for law
6 enforcement purposes that would “disclose techniques and procedures for law enforcement
7 investigations or prosecutions, or would disclose guidelines for law enforcement investigations
8 or prosecutions if such disclosure could reasonably be expected to risk circumvention of the
9 law.” 5 U.S.C. § 552(b)(7)(E). Defendant has withheld information on NCIC-VGTOF-10651-
10 52 because it describes events, behaviors, and objects that should be considered when law
11 enforcement officers are attempting to detect possible terrorist activity. Even if some of the
12 indicators are already known to the public through common sense or other avenues, the
13 disclosure of the combined lists would make it easier to adjust activities and belongings so that
14 fewer indicators are triggered, thereby frustrating law enforcement efforts. Defendant need not
15 produce NCIC-VGTOF-10651-52.

16 **Document No. 27**

17 Information compiled for law enforcement purposes that could reasonably be
18 expected to disclose the identity of a confidential source or the information provided by that
19 source is protected under Exemption 7(D). Confidential sources include “a State, local, or
20 foreign agency or authority or any private institution which furnished information on a
21 confidential basis” 5 U.S.C. § 552(b)(7)(D). A source is considered confidential if it were
22 expressly told that its identity would be held in confidence or if the circumstances surrounding
23 the receipt of information suggest that the informant would not have provided the information
24 without an implicit assurance of confidentiality. Wiener v. Fed. Bureau of Investigation, 943
25 F.2d 972, 986-87 (9th Cir. 1991).

26 The FBI has made two redactions to Document No. 27 under Exemption 7(D).

1 The redaction on NCIC-VGTOF-11098 references a place: it does not reflect information
2 shared by foreign partners, disclose the existence of a foreign partner relationship, or suggest an
3 express or implied promise of confidentiality. Defendant shall, within fourteen days of the date
4 of this Order, remove the redaction to NCIC-VGTOF-11098 asserted under Exemption 7(D) and
5 produce the document to plaintiff. No further disclosure of NCIC-VGTOF-11099 is necessary,
6 however.

7 With regards to the redactions asserted under Exemptions 6 and 7(C), defendant
8 primarily redacts personal identifiers and contact information, the disclosure of which would
9 constitute a clearly unwarranted invasion of personal privacy. Defendant has not, however,
10 justified the redaction of telephone conference access information under either of the identified
11 exemptions. Defendant shall, within fourteen days of the date of this Order, remove the access
12 information redaction from NCIC-VGTOF-11094 and produce the document to plaintiff.

13 **Document No. 39**

14 The information redacted from NCIC-VGTOF-11738-39 and NCIC-VGTOF-
15 11741 was compiled for law enforcement purposes, discloses investigative techniques and
16 analysis, and could reasonably be expected to be of use to those attempting to circumvent the
17 law. With regards to the redactions asserted under Exemptions 6 and 7(C), defendant
18 appropriately redacted personal identifiers and contact information, the disclosure of which
19 would constitute a clearly unwarranted invasion of personal privacy. No further disclosures
20 regarding Document No. 39 are necessary.

21 **Document No. 63**

22 Defendant has made three redactions to Document No. 63 under Exemption 7(D)
23 and 7(E). The other redactions are made pursuant to Exemptions 6 and 7(C). No further
24 disclosures regarding Document No. 63 are necessary.

25 **Document No. 69**

26 The information redacted from Document No. 69 was compiled for law

1 enforcement purposes, discloses investigative techniques and analysis, and, to the extent it
2 reveals travel patterns or regional data, could reasonably be expected to be of use to those
3 attempting to circumvent the law. Defendant has not, however, shown that disclosure of the four
4 categories of records, the totals for each category, or the data on NCIC-VGTOF-9199 would
5 reveal information that is related to travel patterns or regions and could be used to circumvent
6 the law. Defendant shall, within fourteen days of the date of this Order, remove the redactions
7 from the categories, the totals, and NCIC-VGTOF-9199 and produce Document No. 69 to
8 plaintiff.

9 **Document No. 70**

10 The information redacted from Document No. 70 is not based on geographic area
11 and does not reveal travel patterns or regional data related to law enforcement efforts.
12 Defendant's assertion of Exemption 7(E) is therefore unwarranted. Defendant shall, within
13 fourteen days of the date of this Order, remove the redactions from Document No. 70 and
14 produce the document to plaintiff.

15 **Document No. 71**

16 The information redacted from Document No. 71 was compiled for law
17 enforcement purposes, discloses investigative techniques and analysis, and, to the extent it
18 reveals travel patterns or regional data, could reasonably be expected to be of use to those
19 attempting to circumvent the law. Mr. Piehota states that the DCTSC data can be used to
20 identify geographic regions (Dkt. # 58-1), and the Court will not order disclosure of regional
21 data related to law enforcement efforts. Defendant has not, however, shown that disclosure of
22 the various categories of records or the totals for each category would reveal information that is
23 related to travel patterns or regions and could be used to circumvent the law. Defendant shall,
24 within fourteen days of the date of this Order, remove the redactions from the categories and the
25 totals and produce Document No. 71 to plaintiff.

Document Nos. 74 and 76

The information redacted from NCI-VGTOF-10084 and NCIC-VGTOF-10107-08 was compiled for law enforcement purposes, discloses investigative techniques and analysis, and could reasonably be expected to be of use to those attempting to circumvent the law. With regards to the redactions asserted under Exemptions 6 and 7(C), defendant appropriately redacted personal identifiers and contact information, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy. No further disclosures regarding Document Nos. 74 or 76 are necessary.

Document Nos. 79 and 81

FOIA does not require production if the document discloses matters that are “(A) specifically authorized under criteria established by an Executive order to be kept secret in the interest of national defense or foreign policy and (B) are in fact properly classified pursuant to such Executive order.” 5 U.S.C. § 552(b)(1). Mr. Hardy asserts that information in Document Nos. 79 and 81 relates to unique record identifier terminology or the sharing of information gathered through intelligence collection methods and that the disclosure of the information could make the intelligence collection methods susceptible to countermeasures that would inhibit future collection efforts. Dkt. # 56-1. Defendant argues that the information withheld meets the criteria of Executive Order No. 12958, which allows information to be classified as national security information if it reveals “intelligence sources and methods” (§ 1.4(c)), the original classification authority determines that the unauthorized disclosure of the information reasonably could be expected to result in damage to the national security (§ 1.1(a)(4)), and the original classification authority is able to identify or describe the damage (§ 1.1(a)(4)).

Defendant has not shown that the information redacted from Document Nos. 79 and 81 under Exemption 1 was properly classified, that the terminology used to describe a new handling code or the mention of an attached document constitute intelligence sources or

1 methods, or that disclosure of this information would reveal a protected intelligence source or
2 method. Defendant shall, within fourteen days of the date of this Order, remove the Exemption
3 1 redactions from Document Nos. 79 and 81 and produce them to plaintiff.

4 With regards to the redactions asserted under Exemptions 6 and 7(C), defendant
5 appropriately redacted personal identifiers and contact information, the disclosure of which
6 would constitute a clearly unwarranted invasion of personal privacy.

7 **Document No. 80**

8 The first two paragraphs of NCIC-VGTOF-10567 discuss the source of certain
9 intelligence streams and the methods by which those streams are shared. Although the Court has
10 some doubts regarding the adequacy of the procedures used to classify this material, disclosure
11 will not be ordered. The third paragraph of NCIC-VGTOF-10567 and the redacted paragraph on
12 NCIC-VGTOF-10570 do not reveal intelligence sources or methods, however.

13 With regards to the redactions asserted under Exemptions 6 and 7(C), defendant
14 primarily redacts personal identifiers and contact information, the disclosure of which would
15 constitute a clearly unwarranted invasion of personal privacy. Defendant has not, however,
16 justified the redaction of agency, center, or other organizational unit names or contact
17 information.

18 Defendant shall, within fourteen days of the date of this Order, remove the
19 redactions from the third paragraph of NCIC-VGTOF-10567 and NCIC-VGTOF-10570 and the
20 contact information redactions from NCIC-VGTOF-10568-69 and produce Document No. 80 to
21 plaintiff.

22 **Document No. 84**

23 Certain redactions on NCIC-VGTOF-10608, including the first redaction in the
24 first paragraph, the redactions in the bullet list, and the last redaction on the page, discuss the
25 source of certain intelligence streams. Although the Court has some doubts regarding the
26 adequacy of the procedures used to classify this material, disclosure will not be ordered.

1 The other redactions asserted under Exemption 1 do not reveal intelligence sources
2 or methods, however. Neither the terminology used to describe a new handling code nor the
3 legal repercussions of using terminology interchangeably constitutes intelligence sources or
4 methods, and there is no reason to suspect that disclosure of this information would reveal a
5 protected intelligence source or method. Defendant shall, within fourteen days of the date of this
6 Order, remove these Exemption 1 redactions from Document No. 84 and produce it to plaintiff.

7 With regards to the redactions asserted under Exemptions 6 and 7(C), defendant
8 appropriately redacted personal identifiers and contact information, the disclosure of which
9 would constitute a clearly unwarranted invasion of personal privacy.

10 **Document No. 96**

11 Exemption 7(E) authorizes the redaction of information compiled for law
12 enforcement purposes that would “disclose techniques and procedures for law enforcement
13 investigations or prosecutions, or would disclose guidelines for law enforcement investigations
14 or prosecutions if such disclosure could reasonably be expected to risk circumvention of the
15 law.” 5 U.S.C. § 552(b)(7)(E). The incomplete and very general information provided in
16 Document No. 96 regarding behaviors and objects that might be considered suspicious are
17 already known to the public through common sense or other avenues, and their disclosure cannot
18 reasonably be expected to aid terrorists in their attempts to circumvent the law. Defendant shall,
19 within fourteen days of the date of this Order, remove the redactions from Document No. 96 and
20 produce it to plaintiff.

21 **Document No. 100**

22 Mr. Hardy asserts that information redacted from Document No. 100 relates to
23 “intelligence collection methods which are used to investigate a specific individual or group of
24 individuals who the U.S. Government has determined to be of national security interest.” Dkt.
25 # 56. A review of NCIC-VGTOF-10889 does not support this assertion, however. The redacted
26 information does not reveal intelligence collection methods or sources, nor does it describe

1 investigative techniques or procedures. Rather, the redacted information relates to coding
2 options available to an official nominating an individual for inclusion in the NCIC/VGTOF.
3 Having failed to show that the information redacted from NCIC-VGTOF-10889 was properly
4 classified, that the information constitutes intelligence sources or methods, or that disclosure of
5 the information would reveal a protected intelligence source or method, redaction under
6 Exemption 1 is not justified. Defendant shall, within fourteen days of the date of this Order,
7 remove the Exemption 1 redactions from Document No. 100 and produce them to plaintiff.

8 With regards to the redactions asserted under Exemptions 6 and 7(C), defendant
9 appropriately redacted personal identifiers and contact information, the disclosure of which
10 would constitute a clearly unwarranted invasion of personal privacy.

11 **Document Nos. 109 and 110**

12 The information redacted from NCIC-VGTOF-11065 and NCIC-VGTOF-11080
13 was arguably compiled for law enforcement purposes, but the data element disclosed in the
14 redacted text is already known to the public through common sense or other avenues (including
15 preceding sentences in these same documents), and its disclosure cannot reasonably be expected
16 to aid terrorists in their attempts to circumvent the law. Defendant shall, within fourteen days of
17 the date of this Order, remove the Exemption 7(E) redaction from Document Nos. 109 and 110
18 and produce them to plaintiff.

19 With regards to the redactions asserted under Exemptions 6 and 7(C), defendant
20 appropriately redacted personal identifiers and contact information, the disclosure of which
21 would constitute a clearly unwarranted invasion of personal privacy.

22 **Document Nos. 112 and 113**

23 Exemption 7(E) authorizes the redaction of information compiled for law
24 enforcement purposes that would “disclose techniques and procedures for law enforcement
25 investigations or prosecutions, or would disclose guidelines for law enforcement investigations
26 or prosecutions if such disclosure could reasonably be expected to risk circumvention of the

1 law.” 5 U.S.C. § 552(b)(7)(E). Defendant has withheld text from NCIC-VGTOF-11134, NCIC-
2 VGTOF-11138, and NCIC-VGTOF-11142 because it describes specific individuals of interest to
3 the FBI with reference to the conduct and location that excited the agency’s attention. Although
4 the disclosure of this information may, as Mr. Hardy asserts, “warn terrorists from this location
5 and/or who fit the described characteristics that they are under investigation [and] cause them to
6 take countermeasures to avoid detection,” there is no indication that the redacted information
7 “discloses techniques and procedures for law enforcement investigations or prosecutions.”
8 Exemption 7(E) does not, therefore, apply and defendant has offered no alternative grounds to
9 justify the redactions. Defendant shall, within fourteen days of the date of this Order, remove
10 the Exemption 7(E) redaction from Document Nos. 112 and 113 and produce them to plaintiff.

11 With regards to the redactions asserted under Exemptions 6 and 7(C), defendant
12 appropriately redacted personal identifiers and contact information, the disclosure of which
13 would constitute a clearly unwarranted invasion of personal privacy.

14 **Document No. 114**

15 FOIA protects from disclosure information regarding government employees,
16 contractors, and investigative subjects that would constitute a clearly unwarranted invasion of
17 personal privacy. Thus, the redaction of employee/contractor names and their contact
18 information from Document No. 114 is appropriate. There does not, however, appear to be any
19 privacy-related justification for the redaction of agency, center, or other organizational unit
20 names or contact information as occurred on NCIC-VGTOF-11150.

21 Nor has defendant justified its assertion of Exemption 7(E) with regards to
22 Document No. 114. Defendant offers no theory under which the telephone number for the
23 Terrorism Watch List could be considered a law enforcement technique, guideline or procedure.
24 The information redacted from NCIC-VGTOF-11155 on Exemption 7(E) grounds has already
25 been ordered disclosed in the context of Document No. 100.

26 The redactions on NCIC-VGTOF-11156-59 are justified as the information is

1 outside the scope of plaintiff's FOIA request.

2 Defendant shall, within fourteen days of the date of this Order, remove the
3 Exemption 7(E) redactions from Document No. 114 and the redaction on NCIC-VGTOF-11150
4 and produce the document to plaintiff.

5 **Document No. 124**

6 The fourth paragraph under "P. (U) The Foreign Intelligence Surveillance Court
7 (FISC)," the text under "Q. (U) Attorney-Client Privilege" on NCIC-VGTOF-11575, and the
8 list of investigative techniques on NCIC-VGTOF-11576 discuss the source of certain
9 intelligence streams, the methods by which those streams are shared, and/or the means by which
10 intelligence is gathered. The Court therefore finds that the information withheld in these
11 paragraphs is appropriately characterized as national security information in that it reveals
12 "intelligence sources and methods" for purposes of Executive Order No. 12958, § 1.4(c).
13 Although the Court has some doubts regarding the adequacy of the procedures used to classify
14 this material, disclosure of this information will not be ordered. The first three paragraphs under
15 "P. (U) The Foreign Intelligence Surveillance Court (FISC)" on NCIC-VGTOF-11575 discuss
16 requirements of the Foreign Intelligence Surveillance Act and do not reveal intelligence sources
17 or methods, however.

18 The information redacted from NCIC-VGTOF-11580-81 on Exemption 1 grounds
19 has already been ordered disclosed in the context of Document No. 100.

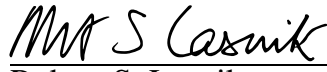
20 With regards to the redactions asserted under Exemptions 6 and 7(C), there does
21 not appear to be any privacy-related justification for the redaction of agency, center, or other
22 organizational unit names or contact information.

23 Defendant shall, within fourteen days of the date of this Order, remove the
24 redactions from the first three paragraphs under "P. (U) The Foreign Intelligence Surveillance
25 Court (FISC)" on NCIC-VGTOF-11575, the Exemption 1 redactions from NCIC-VGTOF-
26 11580-81, and the contact information redactions from NCIC-VGTOF-11579-80 and produce

1 Document No. 124 to plaintiff.

2
3 Having resolved all outstanding issues in the above-captioned matter, the Court
4 directs the Clerk of Court to enter judgment.

5
6 Dated this 21st day of September, 2012.

7
8 
9 Robert S. Lasnik
United States District Judge